UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

William T. Horn, *et al.*,	)	
	)	
Plaintiffs,	)	**Case No 1:06-CV-0325**
	)	
v.	)	**Judge Solomon Oliver, Jr.**
	)	
Digital Cable & Communications, Inc., *et al.*,	)	**Magistrate Judge Perelman**
	)	
Defendants.	)	
	)	

DEFENDANT'S REPLY IN SUPPORT OF SUMMARY JUDGMENT

I. INTRODUCTION

The sole issue remaining in this case — whether Plaintiffs received more than half their compensation in the form of "commissions on goods or services" — should be resolved in favor of Defendants since Plaintiffs cannot dispute that they earned commissions on all customer revenue generated by Defendants. That Cox Communications ("Cox") pays Defendant Digital Cable & Communications, Inc. ("Digital Cable") for the customer services is immaterial to this issue and does not change the undisputed fact that **Plaintiffs earned commissions on all customer service revenue.** The method by which Plaintiffs were compensated — i.e., earning a percentage of the value of each service the individual technician performed resulting in fluctuating weekly income based on volume and customer demand falls squarely within the policy rationale behind the retail service commission employee exemption. See Yi v. Sterling Collision Ctrs., Inc., 480 F.3d 505, 508 (7th Cir. 2007).

In addition, Plaintiffs belatedly attempt to argue that Digital Cable is not an "Establishment" within the meaning of the Act. Even if the Court considers this argument, which was conceded in Plaintiffs' opposition motion, not raised in Plaintiffs' Rule 56(f) affidavit, and beyond the scope of this Court's directive in its November 18, 2008 Order, Plaintiffs do not and cannot put forth any credible evidence to dispute the fact that over 75% of Digital Cable's revenue is from goods or services not for resale, and cable-related customer services are certainly recognized as retail services.

For all these reasons, the Court should grant summary judgment in favor of Defendants.

II. PROCEDURAL BACKGROUND

Even after filing a Rule 56(f) affidavit and obtaining more time for discovery, Plaintiffs have not submitted facts necessary to dispute Defendants' motion for summary judgment.

Pursuant to Rule 56(f), Plaintiffs' counsel submitted an affidavit, claiming he needed discovery **from Defendants** in order to properly respond to summary judgment. Rule 56(f) provides: "if a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may … order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken." Specifically, the Nealon affidavit asks to "depose Defendants in order to learn precisely the nature of their payment structure with Plaintiffs, and whether such payment should be classified as piece rate payment or commission payment." (Nealon Aff. ¶5) Accordingly, pursuant to Plaintiffs' request and Rule 56(f), this Court granted "a brief continuance in order for Plaintiffs to depose Defendants on **whether Plaintiffs' compensation is based upon piece rate or commission.**" (Nov. 18, 2008 Order at 16) (emphasis added).

Instead of submitting evidence from the depositions of Defendants taken in accordance with Rule 56(f), Plaintiffs' counsel instead filed a lengthy opposition brief raising new arguments conceded or not addressed in the initial memorandum and further submitted five unsigned, unsworn affidavits from his own clients. Plaintiffs' new arguments and "evidence" should not be considered and are well outside of the letter and spirit of the Rule 56(f) request. It appears that Plaintiffs' Rule 56 request was submitted for delay — rather than to seek and put forth necessary evidence.[1]

In addition, entire sections of Plaintiffs' supplemental memorandum have been copied verbatim from the opposition papers in an unreported, 6th Circuit case now cited by Plaintiffs, Wilkes v. Pep Boys, 2006 U.S. Dist. LEXIS 69537 (M.D. Tenn. Sept. 26, 2006) aff'd by 2008 U.S. App. LEXIS 10722 (6th Cir. May 15, 2008).[2] Regardless of whether Plaintiffs had copyright permission for such use, Pep Boys involved a compensation system that is not remotely similar to this case.

Even if this Court considers Plaintiffs' belated arguments and other "evidence", the facts still lead to the undisputed conclusion that Plaintiffs were exempt from overtime during the disputed period under the retail or service establishment exemption.

III. PLAINTIFFS WORKED AS COMMISSIONED CUSTOMER SERVICE TECHNICIANS

A. Plaintiffs Earned A Percent Of Digital Cable's Total Revenue On Each Service Performed.

It is undisputed that Plaintiffs earned commissions, and commission rates varied, depending on the service performed. For example, a technician earns a 65% commission on a digital box installation. (Bajusz 8/13/2008 Aff. ¶ 13, attached to Defendant's Motion for

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[1] In addition, Rule 56(g) provides that if an affidavit is submitted in bad faith or solely for delay, "the Court must order the submitting party to pay the other party the reasonable expenses, including attorney fees, it incurred as a result."

[2] Entire sections of Plaintiffs' brief are identical to a filing in the Pep Boys case — the Plaintiffs' Memorandum of Law In Opposition to Defendant's Motion For Partial Summary Judgment and in Support of Plaintiffs' Cross Motion For Summary Judgment, filed in the Middle District of Tennessee on May 4, 2006 (Case No. 3-02-0837).

Summary Judgment) In other words, Digital Cable retains 35% of the service revenue for a digital box installation. In simple terms, the breakdown is as follows:

Digital Box Installation Fee (Paid by Cox Communications)	$16.92
Commission Earned by Plaintiff	65% ($11.00)
Revenue Retained by Digital Cable	35% ($5.92)

While Cox pays the customer service fee on behalf of the customer, Digital Cable splits that fee by giving Plaintiffs a percentage (or commission) on each service performed. The commission rate varies depending on the service performed. For example, a technician would receive 57% of the amount charged for a video service call and 35% of the amount charged for an apartment additional outlet. (Bajusz 8/13/2008 Aff. ¶ 13). **In all instances, technicians earn a percentage of actual revenue generated by the service.**

Accordingly, Plaintiffs have not and cannot dispute that they earned commissions. Nor can Plaintiffs dispute that the commission payment is directly related to the value of the service performed. While Plaintiffs argue this case is similar to Pep Boys, 2008 U.S. App. LEXIS 10722, Pep Boys is completely inopposite. In Pep Boys, the employer moved *away from a direct percentage compensation system* and instead credited employees with a certain number of "labor hours" for each service job performed and then multiplied the labor hours by a flat rate. 2006 U.S. Dist. LEXIS, at 49–50. Digital Cable's compensation system is not remotely similar.

Indeed, Pep Boys underscores "the need for proportionality in any commission-based system." 2008 U.S. App. LEXIS 10722, at **3 (citation omitted). Unlike Pep Boys, the commissions paid to Plaintiffs in every instance are related to the value of the services performed.

Technicians earned a percentage of the revenue generated by the service. Mr. Bajusz's affidavit bears repeating in pertinent part:

> Commission rates vary, depending on the service performed. On average, technician commissions range from approximately 35% to 65% of the total amount charged by Digital Cable for the service performed. Each job's commission is proportional to the amount charged for that particular service. For example, a technician would receive 57% of the amount charged for a Video Service Call, 65% of the amount charged for a Digital Box Installation, and 35% of the amount charged for an Apartment Additional Outlet".

(Bajusz 8/13/2008 Aff. ¶ 13)

In other words, in every instance, the technician earns a percentage of what Digital Cable earns for the service. Unlike Pep Boys, Plaintiffs cannot argue that the commission system lacks proportionality.

Nor does Huntley v. Bonner's, Inc., 2003 U.S. Dist LEXIS 26643 (W.D. Wash. Aug 14. 2003), support Plaintiffs' case. In Huntley, the employer "changed plaintiff's compensation system from a straight percentage of the income the Company received for his work to a 'flat rate' pay system." Id. at *1–2. Like Pep Boys, there was no proportionality between the "commissions" and the employer's revenue. As the Department of Labor ("DOL") has recognized, and as highlighted by the Pep Boys court, payments represent "commissions on goods or services **because the amount of the payment appears to be related to the value of the service performed.**" Dep't of Labor Op. Ltr., No. FLSA2006-15NA (emphasis added). Similarly, in a 1996 DOL letter cited by Plaintiffs, the DOL recognized that installers who "were to be compensated on a percentage of the sales price of the alarm systems" were paid "on a commission basis for purposes of section 7(i) of the FLSA." Like the DOL, Black's Law Dictionary (5th ed.) defines a commission as "the recompense, or reward of an agent, salesman, executor, trustee, receiver, factor, broker or bailee when the same is calculated **as a percentage**

on the amount of his transactions or on profit to the principal." Simply put, a commission lies where an agent obtains a percentage of what is paid the principal. Such is the case here.

B. Plaintiffs Do Not Perform Flat "Piecework".

Nor do Plaintiffs perform traditional piece rate work. A piece rate worker earns, for example, a dollar for every widget made regardless of the ultimate value of the widget. Piece rate workers cannot affect the rate or amount of the commissions. Technicians, however, earn varying rates of commission, depending on the service performed. Technicians deal directly with the customer — the end user — and more than 50% of the time the technician works with the customer to modify the customer's order upon arrival at the customer's home. (Bajusz 1/20/2009 Aff. ¶ 3) If the technician sells more services to the customer, the technician then earns a commission (a percentage of the revenue generated) for that service.

The differences between piece rate workers and technicians can be summarized as follows:

Piece Rate Workers	**Service Technicians**
Piece rate is the same for all work performed	Commission rates vary, depending on services performed
No contact with customer	Daily, direct customer contact at customer's home
No ability to change orders	Orders change over 50% of the time
No ability to make additional sales	Additional sales made, based on modification of order
Piece rate has no proportionality to the value of goods or service	Commission is always proportionate to total value of service performed
Piece rate worker does not earn a percentage of the employer's revenue	Technician always receives a percentage of the employer's revenue for the particular service

Clearly, work performed by technicians is not even similar to flat piece rate work, and Plaintiffs cite to no legal authority to the contrary. For example, in support of their "piece rate" argument, Plaintiffs cite to regulations and case law that apply to "fee basis" payments to professional exempt employees, claiming that "Digital Cable's flat-rate system fits within this description of piecework." See Supplemental Memorandum at 12. To the contrary, Digital Cable has never claimed its technicians are exempt "professional" employees who meet the "uniqueness" test set forth in 29 C.F.R. 541.605(a). Such regulations and interpretative case law are not even applicable.

C. That A Third Party — Cox Communications — Pays For The Customer Service Is Immaterial.

Digital Cable does not dispute that in most instances Cox — not the customer — pays the customer service fee on behalf of the customer. Moreover, this fact in no way is relevant to the remaining issue of whether Plaintiffs were paid commissions. In any event, it is well-settled that "[t]he matter of being paid therefore by a third party is deemed immaterial" in determining the applicability of the retail service exemption. Hodgson v. Profit Company, 68 Lab. Cas. (CCH) P32 at 713 (5th Cir. 1971). The following example helps make the point. Plaintiffs could not dispute that auto repair shops may qualify for the retail service exemption where mechanics earn a percentage of the revenue generated on the work order. Certainly, this result would not change just because an insurance company (rather than the customer) pays for the service performed. Mechanics still receive a percentage of the revenue generated on each job, regardless of who cuts the check.

Similarly, technicians always receive a percentage of the revenue generated on every job. Plaintiffs' unsupported assumption that "Digital Cable charges nothing for the services performed" is simply wrong. Digital Cable is paid *by Cox* for every job; commission is likewise paid to technicians on every job at a rate determined by Digital Cable, not Cox. Regardless of whether Cox (or the customer) pays the customer service fee, Digital Cable splits a percentage of the revenue with its technicians.[3] Any argument over who pays for the service is simply substance over form. See also Reich v. Cruises Only, Inc., 1997 U.S. Dist. LEXIS 23727 (M.D. Fl. 1997) (that a third party paid for the service did not control whether or not the exemption applied); Hodgson, 68 Lab. Cas. (CCH) P32 at 713 (same).

IV. PLAINTIFFS CONCEED THAT THEY EARNED ONE AND A HALF TIMES THE MINIMUM WAGE.

As recognized by the Court in its November 18, 2008 Order, Plaintiffs put forth no evidence disputing the fact that they earned one and a half times the minimum wage. To the contrary, Defendants present both Mr. Bajusz's affidavit and accompanying payroll records, showing that Plaintiffs received over one and a half times the minimum wage assuming they worked 50, 60, and even up to 80 hours a week. Plaintiffs concede this point and filed no evidence to dispute these facts; nor do Plaintiffs challenge Defendants' calculations or payroll records. Indeed, as recognized by the Court in English v. Ecolab, 2008 U.S. Dist. LEXIS 25862, at *51 (S.D.N.Y. Mar. 28, 2008), "Plaintiffs concede that they earned one and one-half times the minimum wage and received more than half of this compensation in the form of commissions, so a certain level of financial welfare has already been established."

[3] Indeed, the Pep Boys court further supports Defendants' position that the value of the service is the pertinent inquiry (without regard to the payor of the service):

> "Finally, the 2006 letter submitted by the defendant indicates the DOL's determination that an automotive dealership paid its flat-rate employees a commission under *Section **7(i)*** when it gave them an amount that appeared to be related to the **value of the service performed** for the customer. See Dep't of Labor Op. Ltr., No. FLSA2006-15NA, at 2 ('Based on a review of the information provided, it is our opinion that payments under the plan represent 'commissions on goods or services' because the amount of the payment appears to be related to the **value of the service performed**.')."

2006 U.S. Dist. LEXIS 69533, at *43 (emphasis added).

V. DIGITAL CABLE IS A RETAIL SERVICE ESTABLISHMENT WITHIN THE MEANING OF THE ACT.

While Plaintiffs did not dispute that Digital Cable is a retail establishment in their memorandum contra (and the Court should not consider this belated argument), Plaintiffs have misstated both the law and facts with respect to the exemption.

First, Plaintiffs erroneously state that Digital Cable "failed to prove it made any sales at all." To the contrary, as set forth in Mr. Bajusz's undisputed sworn testimony, technicians work directly with the customer to change work orders and sell Digital Cable's services. (Bajusz 8/13/2008 Aff. ¶ 5) **In over 50% of the time, customer work orders change after the technicians arrive at the customer's home.** (Bajusz 1/20/2009 Aff. ¶ 3) Accordingly, technicians clearly play a role in working directly with the customer to make sales and change work orders.

In addition, Plaintiffs erroneously cite 29 C.F.R. §779.317 for the proposition that "cable companies lack 'retailability' and thus are not retail establishments." (See Supplemental Memorandum at 17). Twenty-nine C.F.R. §79.317 indeed gives a "partial list of establishments to which the retail concept does not apply." **Contrary to Plaintiffs' assertions, cable companies are conspicuously absent from the list.**

In fact, cable service and installation companies are not mentioned at all in the regulations. This is not surprising since the regulations were last amended in 1970, prior to the era of cable TV. While the regulations are instructive, recognizing that repair-type businesses providing services to the general public generally qualify as retail or service establishments (29 C.F.R. §§779.318–20), the regulations (now over 40 years old) could not contemplate the general public's consumption of cable TV in the 21st century. There is not a "storefront" where customers purchase cable TV; nor do the regulations or interpretive case law require same. See

Ecolab, 2008 U.S. Dist. LEXIS 25862, at *29–34; Reich v Delcorp, Inc., 3 F.3d 1181 (8th Cir. 1993) (an in-home carpet cleaning business deemed as a retail or service establishment); Schwind v. EW & Assocs., 371 F. Supp. 2d 565 (S.D. N.Y. 2005); Gatto v. Mortgage Specialists of Ill., Inc., 442 F. Supp. 2d 529, 541 (N.D. Ill. 2006). As recognized by Ecolab, [a]n establishment … does not have to be frequented by the general public in the same sense that the public must actually visit it and make purchases for goods or services on the premises in order to be considered as available and open to the general public." Ecolab, 2008 U.S. Dist. LEXIS 25862, at *31. Even the outdated regulations recognize that "a refrigerator repair service shop…" is available and open to the general public even if it received all its orders on the telephone and performs all of its repair services on the premises of its customers." 29 C.F.R. §779.319.[4]

VII. CONCLUSION

Accordingly, despite Plaintiffs' attempt to show otherwise, Digital Cable, a retail service establishment within the meaning of the FLSA, clearly paid Plaintiffs commissions on goods or **services**, and such compensation squarely falls within the 7(i) exemption. For all these reasons, as well as the reasons set forth in Defendants' Motion for Summary Judgment, Defendants respectfully request that this Court find that technicians were exempt from overtime during the disputed period, and that judgment be rendered in favor of Defendants.

[4] Wirtz v. Keystone Readers, Inc., 418 F.2d 249, 255 (6th Cir. 1969), relied on heavily by Plaintiffs, predates the outdated regulations yet does not change the analysis. In Wirtz, the only "retail" activity took place in customer homes by door-to-door salesmen. Accordingly, the court held there was no "retail establishment" for purposes of the exemption. In this case, Digital Cable is relying on the "service" aspect of the retail **or** service exemption. Cable customers order cable **services** before the technician arrives, but customers also have the opportunity to modify such services based on the technician's own sales activities. Digital Cable is not a "retailer" within the plain meaning of the word; it is a **service establishment**.

Respectfully submitted,

/s/ Jill S. Kirila

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically with the Court using the CM/ECF system on January 20, 2009, and a copy of the same will be made available by operation of that system upon:

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